No. 15169

IN THE

United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JACK LEWIS AND JOE LEVITAN d/b/a CALIFORNIA FOOTWEAR COMPANY, AND TRINA SHOE COMPANY, *Respondents*

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL RELATION BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce its order (R. 370-372)[1] issued against respondents on October 31, 1955, following the usual proceedings

[1] References to portions of the printed record are designated "R". Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), hereafter called the Act.[2] This Court has jurisdiction of the proceeding pursuant to Section 10 (e) of the Act, the unfair labor practices having occurred at respondents' plants in Los Angeles and Venice, California, within this judicial circuit.[3] The Board's decision and order are reported in 114 NLRB 765.

STATEMENT OF THE CASE

The Board found that respondents committed unfair labor practices under the Act by discriminating against one employee because of her union membership, by discharging another employee because of his testimony against respondents in the hearing in this case, by refusing to bargain with the union entitled to represent their employees, by questioning employees with respect to their union affiliation, and by engaging in surveillance of employees attending a union meeting. Most of the foregoing conduct was found to have occurred at the shoe manufacturing plant in Venice, California, which was operating under the name of respondent Trina. The Board found, however, that Trina was in fact controlled by and was the "alter ego or agent" of respondent California Footwear, which had been engaged in shoe manufacturing at a leased

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[2] The relevant provisions of the Act are set forth in the Appendix, *infra,* pp. 44-47.

[3] Respondents are engaged in the manufacture and sale of shoes and other footwear, and ship substantial amounts of their products in interstate commerce (R. 132; 259-260). No jurisdictional issue is presented.

plant in the city of Los Angeles prior to the institution of operations at Venice. Accordingly, the Board entered its unfair labor practice findings and remedial order against both respondents. The subsidiary facts upon which the foregoing findings are based may be summarized as follows:

I. THE BOARD'S FINDINGS OF FACT

A. The relationship between respondents California Footwear and Trina

During 1952 and until the end of February 1953, California Footwear manufactured and sold shoe products at leased premises in Los Angeles (R. 33-35; 161, 192). In the fall of 1952, however, the co-partners of California Footwear, Jack Lewis and Joe Levitan, leased new premises for their business in Venice, California, about 15 miles' distance from the Los Angeles plant (R. 35; 138, 264-265). This action was prompted by a threatened increased in rent upon expiration of their Los Angeles lease in March, 1953, and by medical advice given to Lewis that he work closer to his home in Santa Monica, California (R. 35; 262-264). Shortly thereafter, Maurice Fellman, employed by California Footwear as a pattern maker, suggested to Lewis and Levitan that in view of the expiration of the Los Angeles lease and Lewis' poor health, the manufacture of shoes for California Footwear be performed by Trina, a company owned by Fellman and his wife (R. 35-36; 166, 168, 174, 246-247, 281-282, 285-286). Trina had been producing shoes over a period of several years in Costa Mesa, a small town to the south of Los Angeles. In 1952, however, Trina discontinued oper-

ations because of lack of operating capital and Fellman went to work for California Footwear (R. 34; 281-282, 290-291). Fellman told Lewis and Levitan that Trina could begin manufacturing operations at once if California Footwear would advance Trina money to discharge its debts and to provide operating capital (R. 36; 168, 265, 269, 297-298). Lewis and Levitan agreed to the plan, provided Fellman would occupy the Venice premises (R. 36; 168, 297-298). Accordingly, a sublease of the Venice plant was made to Trina, and an agreement to manufacture, buy and sell shoe products was executed between California Footwear and Trina (R. 36-37; 324-334).

The sublease to Trina was made for the same period of time and for the same rental amount stated in the principal lease (R. 37; 326-327). The sublease, however, reserved a store room and office room for occupancy by California Footwear and provided that additional office space was to be available for the joint use of Trina and California Footwear (R. 334). The agreement to buy and sell provided that Trina should manufacture and sell to California Footwear all of the latter's requirements; that all merchandise be in accordance with California Footwear's specifications and subject to its inspection in process of manufacture; that California Footwear should provide "technical advice and assistance" in manufacturing, for which an allowance should be made in prices to be agreed upon before entering production on any particular order (R. 324-325). Trina began operations at the Venice plant pursuant to the foregoing agreement in the latter part of December 1952,

and continued its relationship with California Footwear throughout the events in this case (R. 38; 285, 315).

At the outset of operations at Venice, Trina utilized its own machinery which had been moved from Costa Mesa (R. 38; 181). When California Footwear's lease at the Los Angeles plant expired at the end of February 1953, however, its machinery was also transferred to the Venice plant, even though it duplicated Trina's machinery and was unused in many instances (R. 38-39; 182, 178, 180-281, 297). Nonetheless, Trina was billed for the cost of transporting this machinery to the Venice plant, and also paid the rental amounts on equipment which California Footwear held on long term lease (R. 38-39; 182, 278). All other costs of operation were similarly either paid for by California Footwear and billed by it to Trina, or were paid by Trina from advancements made by California Footwear (R. 30; 161, 269). In addition California Footwear loaned Trina $3500, secured by a chattel mortgage on Trina's machinery and equipment, to retire Trina's outstanding indebtedness (R. 38; 265, 277, 335-346). Against the sums of money thus furnished by California Footwear for business operations Trina was credited for the price of the shoes which it processed for California Footwear (R. 40; 161-162). Pricing on lots of shoes was arrived at on the basis of estimated costs of production (R. 39; 298-301). No percentage amount representing profit to Trina was added to the cost figure; neither party expected the prices paid by California Footwear to cover more than manufacturing costs (R. 39-40; 300-301). No attempt was

made to fix the value of the advice and assistance rendered Trina by California Footwear in the production of shoes, nor for the use of California Footwear's machinery (R. 39; 273-275, 635-637). The rent paid by Trina, however, was actually only $200 a month rather than the $275 called for by the lease, the difference representing an adjustment for the occupancy by California Footwear of a portion of the leased premises (R. 38; 170, 273-274, 279-280, 291-292). Periodic bookkeeping balances were taken on the accounts of the parties and at the end of their contractual relationship on January 1, 1954, it appears that Trina was somewhat in debt to California Footwear (R. 40; 315, 319-320). The price amounts credited to Trina by California Footwear constituted, with minor exceptions, the only source of Trina's income from manufacturing, as Trina sold substantially all of its production to California Footwear (R. 40; 268).

Upon moving to the Venice plant Fellman continued to perform the same pattern making job in which he had been employed by California Footwear, and at the same salary—$80.00 a week (R. 42; 166, 169, 173-174). He also exercised general supervisory authority in the plant, participated in the hiring and discharging of employees, and signed the paychecks on behalf of Trina (R. 43, 47, 49; 170, 174, 177-178).

California Footwear's partners also assumed active roles in Trina's operations, particularly following the termination of the lease of the Los Angeles plant in February 1953. Thus, both partners spent full working time at the Venice plant, except when Lewis' sales work necessitated his absence (R. 43-44, 49-50;

171, 175-176, 234-235, 272). Lewis frequently interviewed applicants for employment; on occasion he advised Fellman as to whether the applicants should be hired, and on other occasions hired them directly (R. 43-44; 222-223, 226-227, 240, 266-267). In one instance he represented to a prospective employee that he was the proper person to see about jobs at Venice (R. 44; 239-240). Lewis also spent considerable time on the factory floor instructing employees how to operate their machines or otherwise perform their jobs and inspecting the products in the process of manufacture (R. 49-50; 176, 218, 220-221, 267-268, 290). When Fellman suggested that the entire shop be put on piece rates, Lewis indicated approval, and the system was tried for one week, at the end of which time the former pay system was reinstated at Lewis' direction (R. 47-48; 230-231, 177-179). In addition, Lewis made corrections in piece rate computations for particular employees, and on one occasion Fellman told an employee that such adjustments could be made only by Lewis (R. 47; 232).

Joe Levitan, who had been in charge of production at the Los Angeles plant, also participated actively in the hiring and firing of employees, and in their supervision (R. 43-44, 49-51; 171-172, 173, 207-209, 216-218, 220-221, 290, 295-296, 306). Levitan's principal occupation however, was to inspect shoes at all stages of production and to oversee the packing and shiping operation which was handled on floor area held by Trina under the sublease (R. 49-51; 171-172, 294-295, 305-306). He regularly notified employees when overtime work would be necessary, and ordinarily

assumed responsibility for all operations whenever Fellman was absent (R. 49-51, 53; 177, 237, 290, 294-295, 305-306).

Jack Lewis' son, Albert Lewis, also held a supervisory job at the Venice plant (R. 42; 164, 169). He had been employed at the Los Angeles plant before his employment at Venice (R. 33). Unlike his father and Levitan, Albert Lewis was a salaried employee of Trina. Indeed, during the course of the Venice operations Albert's salary was increased so as to exceed that of Fellman, an occurrence which Fellman complained of to an employee (R. 42; 169-170, 236).

The arrangement between Trina and California Footwear, as described above, continued until the end of 1953, at which time the sublease and other working agreements were terminated (R. 52, 55; 315). Fellman spent considerably less time at the Venice plant in the latter part of 1953, after it had been decided that the arrangement with California Footwear would not be continued, and during his absence Albert Lewis or Levitan took charge of operations (R. 52; 177, 180-181, 296-297, 304). At the beginning of 1954 the Venice plant was no longer in operation; however, California Footwear's partners were planning to resume production either under an arrangement similar to that worked out with Fellman, if they could "get hold of somebody satisfactory," or by operating the plant directly as had been the case at the Los Angeles location (R. 52; 320).

B. Respondents' refusal to bargain with the Union

1. *California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant*—United Shoe Workers of America, Local 122, herein called the Union, had been certified by the Board as the bargaining representative of California Footwear's employees in August, 1951 (R. 32-33; 159). A collective bargaining contract between the Union and California Footwear, executed on October 1, 1952 and containing an automatic renewal date of September 30 in the absence of notice to terminate, was in effect at the time that California Footwear transferred its operations to Venice (R. 56; 350-355).

In January, 1953, Ernest Tutt, organizer for the Union, visited the Los Angeles plant and inquired of Jack Lewis about rumors he had heard that the Los Angeles premises were to be vacated and a new shop was to be opened in Venice (R. 57; 193-195, 265-266). Lewis stated that he was in poor health and had been advised by his doctor "that he should definitely cease having anything to do with operating or running a shoe factory," as a result of which California Footwear "was going out of business" (R. 57; 194). Tutt asked about the Venice plant, and added that he "was anxious that as many of the employees of the California plant would be reemployed at Venice plant as was possible" (R. 57; 194). Lewis, however would not discuss this matter, stating that the Venice shop was "to be owned and run by Mr. Fellman," that "he [Lewis] had nothing to do whatsoever with the hiring or running of the Venice plant, and that [Tutt]

would have to see Mr. Fellman and talk to him about that" (R. 57-58; 194-195, 266).

2. *The refusal at the Venice plant to recognize or deal with the Union*—The working conditions established at the Venice plant were substantially different from those provided in the Union's contract with California Footwear. Thus, the employees at Venice had a lower minimum rate of pay, no cost-of-living bonus, no reporting-in pay, no daily time-and-a-half for overtime work, and less attractive health and welfare benefits (R. 46; 182-191).

Tutt visited Fellman at the Venice plant shortly after his conversation with Lewis to discuss the question of employee representation and the conditions of their employment (R. 58; 195-197). He presented Fellman with a copy of the Union's contract with California Footwear, which he stated was also applicable at the Venice plant (R. 59; 196-197). Fellman took the contract but suggested that Tutt return at a later date to discuss the matter, whereupon Tutt left (R. 58; 197). Following a second and equally inconclusive meeting between Fellman and Tutt, the Union on February 19 wrote a letter through its counsel to both California Footwear and Trina, stating its position as follows (R. 59; 348-349):

> It is the Union's position that the firm known as Trina Shoe Company in truth and in fact is actually California Footwear Company. It is the Union's position that the contract made between California Footwear Company and the Union last year continues to be fully binding upon the firm known as Trina Shoe Company.

> This letter shall also serve as formal notice upon you that . . . all of the employees engaged at the old job at 253 South Los Angeles, Los Angeles, California request employment on jobs which they are capable of performing at the first time that the job becomes available.

In a reply to this letter counsel for California Footwear wrote the Union that Trina was wholly independent, and that California Footwear had "ceased manufacturing operations some time ago" (R. 59; 363-364). Fellman, meanwhile, persistently refused to recognize the Union or to put the contract into effect. On March 18 Fellman signed a statement at Tutt's request to the effect that the Union would be recognized as the employees' bargaining representative if a majority of them so designated it, but thereafter Fellman refused to acknowledge the authenticity of some of the employee dues cards that Tutt presented him in support of the Union's majority claim (R. 60, 63-65; 198, 100-201, 203, 287-289). Fellman also raised certain objections to the contract which the Union had presented to him, but when Tutt yielded on these matters, Fellman stated that the contract was unacceptable for other unspecified reasons (R. 66-67; 204-205). Fellman finally made plain to Tutt that, irrespective of his commitment to recognize the Union upon a showing of majority support, he would not recognize it unless certified by the Board (R. 65; 289).

C. Respondents' coercive opposition to union organization at the Venice plant

Both Jack and Albert Lewis and Fellman made plain their opposition to the Union from the time that the Venice plant began operations. Thus, shortly after employees Charlotte Parker and Lois Murray were hired, Jack Lewis asked them while at work whether they had been asked to join the Union (R. 73; 221). Upon being given a negative reply, Lewis stated that there were "some girls in the plant trying to get something started", and that there were "always a few of those in every plant" (*ibid.*). On another occasion Lewis called employee Lois Murray into his office and again asked whether she had joined the Union, adding that she should not do so, "because [she] would be out a lot of money paying the union dues" (R. 73; 224). Lewis put the same question to employee Murray at a later date, and when Murray told him this time that she had joined the Union, Lewis asked her to identify the person who had solicited her membership, and observed that "it was only someone who was trying to be smart" (R. 73-74; 224-225). Similarly, Lewis questioned another employee, Eugene Piasek, as to his union affiliation when he applied for work, and hired him after Piasek falsely stated that he had been expelled from the union as a result of an argument with a union business agent (R.74; 226-227). Sometime thereafter, employee Piasek, in a conversation with Albert Lewis, asked the latter if it would not be better for California Footwear to accept the Union rather "than to run away from [it]" (R. 75; 233). Albert Lewis replied that the company

had lost money the first year in which the Union had been recognized, and that the business would "move out to another city" if the Union should "catch up with them over here" (*ibid.*).

For his part, Fellman expressed his opposition to the Union in a speech given to the employees at the Venice plant in March 1953 (R. 60-62; 209-210), and also in his questioning of various employees. Thus, a few days after his speech, Fellman, while repairing a machine operated by employee Linda Murray, told Murray that he was angry with her because she had "signed that union card" (R. 81-82; 243-244). When Murray protested that she had not signed a card, Fellman replied "Yes, you did. I know all of them that signed it," and turning to employee Aldea Callahan who stood nearby, asserted "You did too" (*ibid.*). Shortly thereafter Fellman also questioned a third employee, Alice Dupuis, as to why she had signed a union card (R. 82; Tr. 480). Fellman asked still another employee, Anna Cherry, what she thought about the Union, and went on to say "That the union was no good, that they wouldn't do anything for [the employees], and that the union could close the shop down and then everyone would be out" (R. 74; 209).

A further manifestation of Jack Lewis' concern lest the Union organize the employees occurred after working hours on April 14, 1953, when he parked his car across the street from a building in which the Union had scheduled a meeting and observed the employees who attended (R. 76-78; 227-228, 236-238, 318-319). On his way to the meeting employee Piasek noticed Lewis and stopped briefly to speak with him

(*ibid.*). Lewis stated in the course of their conversation, "I thought you told me you were not a union member" (R. 77; 228-229). Piasek stated that he just wanted to see what was going on, and continued on to the meeting, calling the attention of some of the employees outside the building to Lewis' car (R. 77; 229).

D. Respondents' discrimination against employees Roark and Piasek

1. *Respondents' discriminatory refusal to offer Roark employment at the Venice plant*—Only four employees from the Los Angeles plant were hired at the new location in Venice (R. 86; 293). Three of these were mentioned to Lewis by Fellman as persons he wished to have work at the Venice location (R. 86; 292-293). All four were required to be Union members under the existing collective bargaining agreement with California Footwear, but each of the transferred employees ceased paying Union dues upon starting work at Venice, and was thereafter suspended from Union membership for that reason (R. 86; 303-304).

A fifth Los Angeles plant employee, Blanche Roark, was also among those whom Fellman requested to have transferred to the Venice plant, but she was refused employment at the new location. Employee Roark had served as chief shop steward for the Union during the last year of her employment for California Footwear, which had begun in 1950 (R. 84; 211, 214). Late in 1952, when Roark heard that the Venice plant would

be open, she asked Fellman for a job, and Fellman indicated that he would like to have her work for him (R. 84; 212-213). She was the single employee, however, of those requested by Fellman, who was not offered a job at the Venice plant when her employment ended on January 30 at the Los Angeles plant (R. 86; 211, 292-293).

On February 5, 1953, Roark again applied to Fellman at the Venice plant for employment (R. 84; 212-213, 215-216, 293-294). Although there was work available at that time, Fellman told Roark that he would telephone her in two days (R. 84; 213, 294). Fellman did not call her, and when Roark again inquired about a job, Fellman once more put her off, telling her that he could not use her at that time but that he would call her later (R. 84; 213). However, Fellman did not thereafter call her, until months later, after the complaint in this case was filed against respondents (R. 84-85; 214, 286-287).

2. *Respondents' discriminatory discharge of Employee Piasek because of his testimony before the Trial Examiner in this case*[4]—Employee Piasek was regularly employed as a cutter at the Venice plant from early in April until mid-summer 1953, when operations closed down for several weeks (R. 104-105; 225-226, 233-234). On October 26, Piasek resumed his

[4] The charge alleging Piasek's discriminatory dismissal was filed after the hearing at which he testified was closed. On motion of the General Counsel of the Board, however, the hearing was thereafter reopened, the complaint amended to allege the violation pertaining to Piasek, and evidence pertaining thereto was received as a part of the same case (R. 18-21, 306-322).

job, and worked fairly regularly until November 5, when he was told that there was no work available at that time (R. 106; 309-313). On November 10 Piasek attended the hearing before the Trial Examiner in this case, having been called as a witness against respondents (R. 107; 310-312). The following day, during which the hearing was in recess, Piasek reported to the Venice plant, and was called into Jack Lewis' office where Lewis asked him "Gene, why do you have to testify against me?" (R. 107; 312). Piasek replied "Listen, Jack, you do such unfair labor practices over here . . . everybody wants to testify against you" (R. 107; 312).

When the hearing was resumed on Friday, November 13, Lewis approached Piasek in the hearing room and told him to report for work on the following Monday. Piasek, who had not worked for several days, had not been called to the witness stand, but indicated that he would be on the job unless he had to testify on that day (R. 108; 312-313). The following day, Saturday, Lewis made an unsuccessful attempt to find a permanent replacement for Piasek (R. 108-109; 321-322). The person whom he contacted for the job was already employed; nonetheless, Lewis stated to him that he (Lewis) expected "to get straightened out [with the Union] the beginning of next week . . . and we may get together again" (R. 108; 321-322).

On Monday, November 16, Piasek testified as a witness for the General Counsel of the Board with respect to Lewis' questioning him about his Union membership, Lewis' surveillance at the Union meeting

of April 14, and various facts relating to the control exercised by the Lewises and Joe Levitan over the Venice operations (R. 225, *et seq.*). Piasek reported for work at the Venice plant the next day, in accordance with Lewis' instructions, but was told on his arrival that he was not needed, and that he would be called when there was work for him (R. 109; 313). Piasek was never recalled thereafter. A few days later, the cutter's job was offered on a permanent basis to another employee (R. 110; 306-308, 315-317).

II. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board found, one member concurring in part and dissenting in part, that respondents had committed violations of Section 8 (a) (1), (3), (4) and (5) of the Act.[5] The refusal to hire employee Roark at the Venice plant, and the dismissal of employee Piasek were determined to constitute unfair labor practices under Sections 8 (a) (3) and (4) of the Act, respectively, the former

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[5] Member Rodgers agreed with the majority that respondent Trina was the agent of respondent California Footwear in operating the Venice plant, and concurred with respect to the finding of violations of Section 8 (a) (1) based on respondents' interrogation and surveillance of employees, of Section 8 (a) (4) based on the discharge of employee Piasek, and of Section 8 (a) (5) based on the refusal to discuss with the Union the transfer of the Los Angeles employees to the Venice plant (R. 133, 146). Member Rodgers, however, dissented from the findings that employee Roark was unlawfully discriminated against, and that additional violations of Section 8 (a) (5) were committed by the refusal to recognize the Union as representative of the Venice plant employees, the repudiation of the existing contract, and the unilateral substitution of different terms and conditions of employment at the Venice plant (R. 146-157).

found to have been motivated by Roark's Union affiliation and the latter by Piasek's testimony against respondents in this case (R. 116, 132-133, 140-142). The Board held that Lewis' questioning of employees Parker, Lois Murray, and Piasek about their Union membership, his surveillance of the employees attending the Union meeting of April 14, and Fellman's questioning of employees Linda Murray, Callahan, Dupuis and Cherry about their affiliation with and attitude toward the Union constituted interference, restraint and coercion of employees in their right to self-organization and thus violations of Section 8 (a) (1) of the Act (R. 83, 132-133). Finally, the Board concluded that although the Venice plant was leased by California Footwear for reasons having nothing to do with the Union, the Venice operation was nonetheless controlled by California Footwear, and that it was operated in Trina's name as a subterfuge in an attempt "to get rid of the Union" and to escape the effect of the contract which California Footwear had executed with the Union (R. 135). From this determination it followed in the Board's opinion not only that California Footwear was responsible along with Trina for the unfair labor practices committed at the Venice plant, but also that California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant, the refusal to keep in effect the terms of the existing contract, the unilateral imposition of working conditions at Venice, and the refusal to recognize the Union as the representative of the employees at Venice all

constituted violations of the bargaining requirements of Section 8 (a) (5) of the Act (R. 139-140).[6]

To remedy the foregoing violations, the Board's order requires respondents[7] to cease and desist from discriminating against their employees because of their Union membership or because of testimony given in proceedings under the Act, from refusing to bargain collectively with the Union, and from in any other manner interfering with their employees' right of self-organization. Affirmatively, the Board's order requires respondents to reinstate employee Piasek, to make him and employee Roark (who had refused an offer of reinstatement made prior to the hearing (R. 214)), whole for any loss of earnings suffered by reason of the discrimination against them, to bargain collectively on request with the Union, and to post appropriate notices (R. 142-145).

SUMMARY OF ARGUMENT

I. The Board properly found that Trina was the "alter ego or agent" of California Footwear in operating the Venice plant and that California Footwear was therefore jointly responsible with Trina for the unfair labor practices which occurred at Venice. Trina was in every important respect subject to Cali-

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[6] In addition, the Board, in agreement with the trial examiner, concluded that there was insufficient evidence to support the allegations in the complaint charging that employees Anna Cherry and Jack Rosenthal had been discriminatorily discharged, and dismissed the complaint in those respects (R. 98, 104, 145).

[7] The Board made its order against Trina applicable only to the extent that Trina "has acted or in the future may act on behalf of" respondent California Footwear (R. 142).

fornia Footwear's control. It was wholly dependent upon California Footwear for operating capital, had mortgaged its machinery to California Footwear, and was responsive to California Footwear's decisions with respect to employment practices and production methods. The goods manufactured by Trina and delivered to California Footwear, moreover, were priced to cover only manufacturing costs, including a salary for Trina's owner who served as a general foreman, and did not allow for any profit. The record thus establishes a complete absence of independent authority on the part of Trina.

II. The frequent instances of respondents' interrogation of the employees as to their union attitudes and affiliations occurred in a context of open hostility to the Union. Accordingly, on settled authority this interrogation was violative of Section 8 (a) (1) of the Act. Similarly, the Board's finding that Lewis' surveillance of employees entering a Union meeting constituted a violation of the same statutory provision is supported by the uniform holdings of the courts of appeals. Respondents' defense before the Board to the interrogation and surveillance charges rested on testimony which the Trial Examiner and the Board discredited; the Board's rulings in this respect should not, on the record in this case, be overturned on judicial review.

III. Substantial evidence supports the Board's finding that respondents unlawfully discriminated against employees Roark and Piasek. Although employee Roark was an experienced and competent worker whom Fellman requested to be transferred to

Venice, she was refused a job at the Venice plant for a false reason. Her status as a Union steward at the Los Angeles plant and Lewis' determination that the Venice plant be staffed by non-union employees furnish the only reasonable explanation for rejecting her application for employment.

Similarly, the precipitate discharge of employee Piasek following his testimony against respondents in the hearing in this case together with the inadequacy of the excuses made for the discharge amply support the Board's conclusion that he was fired because of his testimony.

IV. In view of the fact that California Footwear controlled operations at the Venice plant, it was obliged under the Act to discuss with the Union the question of transferring employees to Venice upon cessation of business at the Los Angeles plant. California Footwear's refusal to consult with the Union on this matter upon the latter's request therefore constituted a violation of Section 8 (a) (5) of the Act. Because of California Footwear's unfair labor practice in this respect, it was not entitled to refuse recognition of the Union at the Venice plant on the ground that the Union was unable to show support by a majority of the employees at the new location. The Board could reasonably conclude that, absent California's unlawful refusal to negotiate, an agreement might have been reached by which substantially the same work force would have been maintained at the Venice plant as existed at the Los Angeles plant. And it is settled law that a certified bargaining representa-

tive does not lose its status where, as here, its loss of majority support may reasonably be attributed to employer unfair labor practices. It also follows from respondents' continuing obligation to recognize the Union that the unilateral imposition of new terms and conditions of employment at the Venice plant and the termination of the existing contract constituted violations of Section 8 (a) (5) of the Act.

ARGUMENT

The Board's imputation of liability to respondent California Footwear for the unfair labor practice findings based on interference and discrimination at the Venice plant, nominally operated by respondent Trina, rests on its factual determination that the Venice operation was controlled by California Footwear, and that Trina was merely the "alter ego or agent" of California Footwear. With respect to the refusal to bargain finding moreover, the existence of the unfair labor practice itself turns on whether the Venice operation was simply a new location at which California Footwear was carrying on the same business. It was upon this premise that the Board concluded California Footwear was required to discuss with the Union the transfer of its employees to the Venice plant, and to recognize the Union as the representative of the employees at the Venice plant. Accordingly, before turning to the unfair labor practices which have been found in this case, it is appropriate first to show the correctness of the Board's finding that California Footwear controlled and operated the Venice plant through the agency of Trina.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CALIFORNIA FOOTWEAR CONTROLLED OPERATIONS AT THE VENICE PLANT

Settled law establishes that an employer is responsible for the commission of unfair labor practices arising in a business enterprise whose operations and labor relations he actually controls. The employer may not evade liability by the device of recasting the business as a nominally independent enterprise if he in fact continues to direct its operations. Accordingly, employers have uniformly been held responsible for violations of the Act committed by newly contrived business organizations which in reality are "a disguised continuance of the old employer", *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 106; *N.L.R.B.* v. *Andrews*, 236 F. 2d 44 (C.A. 9).[8] Common indicia of such "disguised continuance" are financial control over the nominally independent enterprise through advances of operating capital and raw materials,[9] supervision and direction of produc-

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[8] See also *N.L.R.B.* v. *McCatron*, 216 F. 2d 212, 214 (C.A. 9), certiorari denied, 348 U.S. 943; *N.L.R.B.* v. *O'Keefe & Merritt*, 178 F. 2d 445, 449 (C.A. 9); *N.L.R.B.* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *Dickey* v. *N.L.R.B.*, 217 F. 2d 652, 653 (C.A. 6); *N.L.R.B.* v. *Dayton Coal & Iron Corp.*, 208 F. 2d 394, 395 (C.A. 6); *N.L.R.B.* v. *Somerset Classics*, 193 F. 2d 613, 615, certiorari denied, 344 U.S. 816; *N.L.R.B.* v. *E. C. Brown*, 184 F. 2d 829, 831 (C.A. 2); *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 984 (C.A. 7), certiorari denied, 320 U.S. 789; *N.L.R.B.* v. *Condenser Corp.*, 128 F. 2d 67, 71-72 (C.A. 3). Cf. *N.L.R.B.* v. *Grower-Shipper Veg. Assoc.*, 122 F. 2d 368, 378 (C.A. 9).

[9] See *N.L.R.B.* v. *McCatron*, 216 F. 2d 212, 214 (C.A. 9), certiorari denied 348 U.S. 943; *N.L.R.B.* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *N.L.R.B.* v. *O'Keefe & Merritt*, 178 F. 2d 445, 448-449 (C.A. 9).

tion,[10] and control over labor relations policies.[11] In such circumstances there is a "measure of domination * * * inconsistent with the notion that [the nominally independent enterprise] is really a free agent either in handling the enterprise or dealing with the men employed. *N.L.R.B.* v. *Long Lake Lumber Co., supra,* n. 8, at p. 364.

Viewed in the light of these settled principles, the record in this case amply supports the Board's finding that California Footwear was in reality the controlling force behind the operation of the Venice plant. As shown in the Statement, pp. 3-8, financially Trina was wholly subject to California Footwear's pleasure; having no independent source of capital, Trina relied on California Footwear for all operating expenses, and in addition had mortgaged its machinery to California Footwear to secure a loan to pay off other business debts. Pricing of the footwear manufactured at Venice was designed to cover costs but not to afford Trina a profit, a circumstance irreconcilable with the contention that Trina was an independent business enterprise. Moreover, Trina's owner, Fellman, received the same salary he had drawn while working as a pattern maker for California Footwear at the Los Angeles plant, and did much of the same work. That Fellman was in no position even to control his own rate of pay is evidenced by his

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[10] See *Dickey* v. *N.L.R.B.*, 217 F. 2d 652, 653 (C.A. 6); *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 984 (C.A. 7).

[11] See *N.L.R.B.* v. *McCatron, supra,* n. 8; *N.L.R.B.* v. *Long Lake Lumber Co., supra,* n. 8; *N.L.R.B.* v. *Condenser Corp.*, 128 F. 2d 67, 72 (C.A. 3).

complaint that Albert Lewis was given an increase which placed his salary above Fellman's. Fellman's position, in short, was simply that of a foreman at the Venice plant who was subject to the control and direction of California Footwear. This is all the more apparent in view of Lewis' and Levitan's participation in hiring, their supervision of production processes, and their general direction of all phases of the business. Indeed, Fellman was able to institute a system of piece rates only upon obtaining Lewis' permission, and then eliminated the system when Lewis found it unsatisfactory.

These considerations together with the manner in which California Footwear utilized the move to the Venice plant to eliminate the Union, as described in the Statement, *supra,*[12] are consistent only with the conclusion that the Venice plant was operated under the control of California Footwear no less than the Los Angeles plant. California Footwear continued to expend all monies required for manufacturing and to receive all profit from sales, and also continued to direct both the processes of production and employment practices. Trina, on the other hand, contributed to the business no more than its name. Plainly, the Board was entitled to look beyond the legal facade erected by California Footwear and to conclude that California Footwear itself must bear responsibility

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[12] Note particularly the role Lewis was found by the Board to have played in the discrimination against employees Roark and Piasek, and in carrying on a program designed to restrain the employees from joining the Union (*supra,* pp. 12-17, R. 141).

for the policies and practices followed at the Venice plant.[13] See *N.L.R.B.* v. *Andrews,* 236 F. 2d 44 (C.A. 9).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENTS' QUESTIONING OF EMPLOYEES ABOUT THEIR UNION AFFILIATIONS AND SURVEILLANCE OF EMPLOYEES ATTENDING A UNION MEETING VIOLATED SECTION 8 (a) (1) OF THE ACT

As shown in the Statement, *supra,* pp. 12-14, respondents persistently opposed the unionization of the employees at the Venice plant. Indeed, the pains taken by Lewis to operate the Venice plant under Trina's name and his deception in telling the Union that he was going out of business and had no connection with the Venice plant can be plausibly explained, as the Board found, only upon the premise that Lewis hoped "to utilize the move [to Venice] as an opportunity to get rid of the Union" (R. 135). Supporting this conclusion is the remark of Lewis' son, Albert, to employee Piasek that the business would "move out to another city" if the Union should "catch up with them over here" (R. 233). After the Union began its organizational drive at the Venice plant, respondents' hostility became open, as evidenced by Fellman's anti-union speech to the employees and his repudiation of an earlier promise to recognize the Union upon a showing of pledge and dues cards executed by a majority of the employees (*supra,* pp. 10-13).

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[13] Respondents' attempts before the Board to show that Trina was independent of California Footwear were largely premised upon testimony which was discredited both by the Trial Examiner and the Board. As this Court has had recent occasion to reiterate, "questions of credibility . . . are for the examiner and the Board, not for [the court], to resolve." *N.L.R.B.* v. *Wagner,* 227 F. 2d 200, 201.

Viewed in this context, the interrogation by respondents of the employees as to their union attitudes and affiliations, described in the Statement, *supra,* pp. 12-13, and found by the Board to constitute unfair labor practices, was plainly coercive and therefore violative of Section 8 (a) (1). Moreover, other conduct by respondents reinforces this conclusion. Thus, after questioning employees Parker and Murray about the Union, Lewis referred to the Union's organizational effort as "some girls in the plant trying to get something started," and added that there were "always a few of those in every plant" (R. 221). Similarly, Lewis told another employee, after asking her whether she had joined the Union, that if she joined she "would be out a lot of money paying the union dues," and referred to the dues solicitor as "only someone who was trying to be smart" (R. 224-225). Fellman also made clear to the employees he questioned that he was displeased by their support for the Union, and on one occasion emphasized to an employee "that the union was no good, that they wouldn't do anything for [the employees], and that the union could close the shop down and then everyone would be out" (*supra*, p. 13).

Respondents' interrogation found to be improper by the Board thus does not stand alone, but rather "form[s] part of an overall pattern whose tendency is to restrain or coerce." *N.L.R.B.* v. *McCatron,* 216 F. 2d 212, 216 (C.A. 9). It falls, therefore, into the class of anti-union conduct which this Court has consistently condemned. See e.g. *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 904; *N.L.R.B.* v. *Radcliffe,*

211 F. 2d 309, 314, certiorari denied, 348 U.S. 833; *N.L.R.B.* v. *Home Dairies Co.,* 211 F. 2d 784; *N.L.R.B.* v. *Pacific Moulded Products Co.,* 206 F. 2d 409, certiorari denied, 346 U.S. 938.

The separate finding of a violation of Section 8 (a) (1) based on Lewis' surveillance of the employees who attended the Union meeting of April 14, 1953, similarly fits within an established category of unlawful interference with employee rights. The evident object of spying on employees attending union meetings is "to discover what employees [are] active in the union." *N.L.R.B.* v. *Vermont American Furniture Co.,* 182 F. 2d 842, 843 (C.A. 2). The fact that an employer would invade the privacy of his employees to obtain this information carries a strong suggestion that its acquisition is sought for the purpose of affecting the security of their tenure. Such a purpose is likely to be regarded as more than just a suggestion where, as here, the employer makes his opposition to unionization plain and commits other unfair labor practices to secure its defeat. Accordingly, this and other Courts of Appeals have long adopted the rule that surveillance at places of union meetings is contrary to the Act's guarantee to employees against interference, restraint, and coercion in their organizational affairs.[14]

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[14] See, e.g., this Court's decision in *N.L.R.B.* v. *Grower-Shipper Veg. Assoc.,* 122 F. 2d 368, 376; *No. Whittier Heights Citrus Assoc.* v. *N.L.R.B.,* 109 F.2d 76, 78, certiorari denied 310 U.S. 632.

First Circuit: *N.L.R.B.* v. *Saxe-Glassman Shoe Corp.,* 201 F. 2d 238, 242.

Third Circuit: *N.L.R.B.* v. *Electric City Dyeing Co.,* 178 F. 2d 980, 981.

Before the Board respondents' defense both to the surveillance and interrogation charges rested on testimony which was discredited by the trial examiner, whose rulings were affirmed by the Board.[15] As stated in the Intermediate Report resolutions of conflicts in testimony were made upon the basis of "apparent keenness of memories, the possibilities of misunderstanding of spoken words, consistency of testimony within itself, consistency of testimony with other testimony and with known facts, disposition of a witness to depart from the truth, his interest or bias, the conduct of the witness while testifying, and many other factors" (R. 72). This Court has made clear that such resolutions are not to be overturned on judicial review on a record such as that in this case.

Fourth Circuit: *N.L.R.B.* v. *Pacific Mills*, 207 F. 2d 905, 907.

Fifth Circuit: *N.L.R.B.* v. *Sunnyland Packing Co.*, 211 F. 2d 923, 924.

Sixth Circuit: *Magnavox* v. *N.L.R.B.* v., 211 F. 2d 132, 133.

Seventh Circuit: *Donnelly & Sons* v. *N.L.R.B.*, 156 F. 2d 416, 419, certiorari denied 329 U.S. 810.

Eighth Circuit: *N.L.R.B.* v. *Hunter Engineering Co.*, 215 F. 2d 916, 918-919.

Tenth Circuit: *N.L.R.B.* v. *Standard Oil Co.*, 124 F. 2d 895, 908.

District of Columbia Circuit: *Anthony & Sons* v. *N.L.R.B.*, 163 F. 2d 22, 26-27, certiorari denied 332 U.S. 773.

[15] Thus, with respect to the interrogation Lewis and Fellman either denied or could not remember having asked the questions to which various employees testified (R. 72). With respect to the surveillance incident, Lewis testified that he was waiting with a friend in his automobile for the latter to catch a bus, and that the concurrence of a Union meeting across the street was fortuitous. The trial examiner, however, credited another witness who testified that Lewis was alone in the car, and noting that the bus stop near which Lewis was parked was not the most convenient or likely bus route to the alleged friend's destination, concluded that "Lewis took advantage of the occasion to stop near the union meeting place for the purpose of surveillance" (R. 79).

N.L.R.B. v. *Wagner,* 227 F. 2d 200, 201, certiorari denied, 351 U.S. 919. See note 13, *supra.*

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT RESPONDENTS UNLAWFULLY DISCRIMINATED AGAINST EMPLOYEES ROARK AND PIASEK

1. Employee Roark, as the Board concluded, was refused a job at the Venice plant because Lewis was determined that the Union should not follow California Footwear's move to Venice. Roark was an experienced and competent worker; indeed, before operations began at the Venice plant, she was one of the few California Footwear employees whom Fellman told Lewis he would like to have work for him (*supra,* pp. 14-15). But Roark had also been a Union steward at the Los Angeles location (*ibid.*). And, as we have shown, every step taken by Lewis in connection with the move to Venice was characterized by his desire to operate an unorganized plant at the new location: the subterfuge in establishing Trina as the apparent employer at Venice; the discontinuance of the Union contract at Venice; the interrogation of employees as to their Union affiliation, the surveillance of a Union meeting, and the anti-Union statements at the Venice plant; and the refusal to recognize the Union as representative of the Venice plant employees irrespective of whether a majority of them signed pledge cards (*supra,* pp. 9-14). It is also significant that the only four employees at the Los Angeles plant who were given jobs at the new location immediately dropped their support for the Union after moving to Venice, and were thereafter expelled from membership for nonpayment of dues (*supra,* p. 14). The

transfer to Venice of these four employees thus scarcely shows a willingness to hire Union advocates, as respondents contended before the Board; a more reasonable inference is that Lewis had cause to believe that the membership of these employees was solely attributable to the compulsory membership provision in the contract at the Los Angeles plant,[16] and that they would not continue to support the Union at Venice. Accordingly, viewing respondents' refusal to hire Roark at the Venice plant "in the total context of respondent's conduct . . . which discloses anti-union sentiment expressed in part in a pattern of [unlawful] action" (*N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 907 (C.A. 9)),[17] the record amply supports the Board's conclusion that Lewis influenced Fellman not to hire Roark as part of the effort "to escape . . . the Union" (R. 91, 141).

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[16] The Union membership of the new employee at the Venice plant who performed the job which Roark had done at the Los Angeles plant, a factor emphasized by respondents before the Board, also does not militate against the Board's conclusion that Roark was unlawfully discriminated against. The trial examiner found, and his findings in this respect were adopted by the Board, that the new employee's union membership record was limited to a period of time when he had worked under a compulsory membership contract for another employer (R. 86, 87, 89). He had also previously worked as a foreman at a different plant, at which time he was not a union member. Accordingly, as observed by the trial examiner, "respondents would not necessarily think of [him] as a union advocate when employing him" (R. 89).

[17] See also *N.L.R.B.* v. *Osbrink,* 218 F. 2d 341, 343 (C.A. 9), certiorari denied, 349 U.S. 928; *N.L.R.B.* v. *Radcliffe,* 211 F. 2d 309, 313 (C.A. 9), certiorari denied, 348 U.S. 833; *N.L.R.B.* v. *Dant & Russell,* 207 F. 2d 165, 166 (C.A. 9); *N.L.R.B.* v. *Reeves Rubber Co.,* 153 F. 2d 340, 341 (C.A. 9); *N.L.R.B.* v. *Bank of America,* 130 F. 2d 624, 627 (C.A. 9, certiorari denied, 318 U.S. 791. Cf. *I.A.M.* v. *N.L.R.B.,* 311 U.S. 72, 75.

Confirming this finding is the fact that Fellman falsely told Roark on February 5, when she applied at the Venice plant, that there was no work available for her at that time (*supra*, p. 15).[18] "It is well settled that the inferences drawn by the Board are strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny." *N.L.R.B.* v. *Dant & Russell,* 207 F. 2d 165, 167 (C.A. 9).

In short, the record shows that Roark, an experienced and satisfactory employee, was refused employment without any valid reason having been given her. "Such action on the part of an employer is not natural." *E. Anthony & Sons* v. *N.L.R.B.,* 163 F. 2d 22, 26 (C.A. D.C.), certiorari denied, 332 U.S. 773. The only reasonable explanation afforded in the record is the one adopted by the Board — that respondents' treatment of Roark constituted a consistent part of the policy of preventing the Union from obtaining employee support at the Venice plant.

2. The Board's finding that respondents discharged employee Piasek because he testified against them in the hearing before the trial examiner, and therefore violated Sections 8 (a) (4) and (3) of the Act, is also

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[18] At the hearing before the trial examiner, Fellman did not deny the availability of work for Roark on February 5, but testified that Roark had stated she could not come to work immediately because of a commuting problem. This version of the February 5 incident was rejected by the trial examiner, who credited Roark's testimony that Fellman had told her that she was not then needed but that she would be called when she could be used. The Board's adoption of the trial examiner's resolution of this conflict in testimony should not be overturned, see p. 29, *supra.*

amply supported in the record.[19] Until it became known to respondents that Piasek was prepared to be a witness in the unfair labor practice case against them he worked regularly as a cutter at the Venice plant. On November 10, 1953, however, Piasek appeared at the hearing in this case before the trial examiner, awaiting call to testify for the General Counsel. Lewis' feelings about this occurrence were revealed the following day when he asked Piasek, although the latter had not yet testified, ". . . why do you have to testify against me?" (R. 312). Promptly thereafter, as described *supra,* p. 16, Lewis made an attempt to find another cutter, but the person he called was already employed. Nonetheless, when Piasek reported for work on the day after he had finished his testimony against respondents, as previously instructed by Lewis, he was told that he was not needed, and was never thereafter recalled.

The precipitate nature of the discharge, Piasek's undenied experience and ability as a cutter, Lewis' questioning of Piasek's appearance as a witness in this case, and respondent's established animosity toward the Union which led to the unfair labor practice proceedings in which Piasek testified favorably to the Union, combine to support the Board's conclusion that the discharge is attributable to Piasek's role as a

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[19] Section 8 (a) (4) makes it an unfair labor practice for an employer "to discharge . . . an employee because he has . . . given testimony under this Act." A violation of this provision may also fall, as in this case, under the more general prohibition contained in Section 8 (a) (3) against discrimination affecting tenure of employment. *N.L.R.B.* v. *Knickerbocker Plastic Co.,* 218 F. 2d 917 (C.A. 9).

witness against respondents. Cf. *N.L.R.B.* v. *Texas Independent Oil,* 232 F. 2d 407, 451 (C.A. 9); *N.L.R.B.* v. *Martin,* 207 F. 2d 655, 658 (C.A. 9), certiorari denied, 347 U.S. 917; *N.L.R.B.* v. *Oklahoma Transportation Co.,* 140 F. 2d 509 (C.A. 5).

Before the Board respondents contended that Piasek was terminated in order that the cutting job could be given to Jack Rosenthal, who had earlier worked at the Venice plant and whose dismissal therefrom on April 28, 1953 had been alleged by the complaint in this case to be an unfair labor practice.[20] According to respondents, they decided, about the time of Piasek's testimony, that it would be prudent to cut off any further back pay liability toward Rosenthal, which might accrue in the event that his discharge were found to be unlawful, by offering him the cutter's job which Piasek held. The explanation does not withstand analysis. In the first place, respondents had already cut off any possible back pay liability to Rosenthal, by offering him reinstatement in May 1953, only a month after he had been discharged. But even if respondents were not certain about the effect of the May offer of reinstatement, the lengthy delay in waiting from April until November, just after Piasek's unfavorable testimony, before taking this step is suggestive of more than a coincidental connection between the two events. Nonetheless, as the trial examiner observed, no attempt was made to

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[20] As stated *supra,* p. 19, n. 6, the Board dismissed the allegations in the complaint pertaining to Rosenthal's discharge. The trial examiner, whose findings in this respect were adopted by the Board, concluded that Rosenthal had been discharged because only one cutter was needed, and Piasek, who had also been hired as a cutter, was the more experienced of the two (R. 98-104).

notify, or discuss the matter with, the attorney representing the General Counsel of the Board, even though it was apparent that the action would be viewed with suspicion (R. 115). Finally, Lewis' attempt to replace Piasek with another employee as soon as he found that Piasek intended to testify (*supra,* p. 16) can scarcely be reconciled with the position that Piasek was discharged to make room for Rosenthal. In sum, the Board was fully justified in concluding "that the reasons given by the respondent for the discharge were merely attempts to create a plausible excuse to discharge [Piasek for his] . . . unfavorable testimony at the . . . hearing." *N.L.R.B.* v. *Knickerbocker Plastic Co.,* 218 F. 2d 917, 920 (C.A. 9).

IV. THE BOARD PROPERLY FOUND THAT RESPONDENTS VIOLATED SECTION 8(a)(5) OF THE ACT BY REFUSING TO DISCUSS WITH THE UNION THE TRANSFER OF EMPLOYEES TO THE VENICE PLANT, BY DISCONTINUING THE EXISTING CONTRACT AND ESTABLISHING NEW TERMS OF EMPLOYMENT, AND BY REFUSING TO RECOGNIZE THE UNION AS THE REPRESENTATIVE OF THE EMPLOYEES AT THE VENICE PLANT

We have shown that the elaborate arrangement by which California Footwear sought to conceal its control of operations at the Venice plant was conceived as a method to eliminate the Union representation which had been established at the Los Angeles plant. To the extent that the transfer of their business to Venice enables respondents to cease dealing with the Union and to disregard the contract which they executed with the Union, the plan succeeds, and, we submit, the objectives of the Act are *pro tanto* nullified. Accordingly, at the heart of the Board's decision and order in this case are the findings that

respondents failed in their duty under Section 8 (a) (5) of the Act to bargain in good faith with the representative of their employees, and the requirement that they recognize and bargain with that representative.

The findings of the Board in this respect begin with California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant, and carry through to the subsequent repudiation of the existing contract with the Union, the unilateral imposition of new terms of employment, and the refusal to recognize the Union as the representative of the employees at Venice.

As stated *supra,* p. 9, Union organizer Tutt sought to negotiate the transfer of employees to the Venice plant in January, 1953, as soon as he learned of the projected move. Tutt told Lewis that he "was anxious that as many of the employees of the California plant would be reemployed at the Venice plant as was possible" (R. 194). Lewis refused to discuss the matter on the ground that California Footwear "had nothing to do whatsoever with the hiring or running of the Venice plant . . ." (R. 193-195). However, as shown *supra,* pp. 3-8, 23-25, the Venice plant in fact was nothing more than a new location for the continuance of business by California Footwear. Accordingly, the single question respecting respondents' conceded refusal to discuss the transfer of employees to the Venice plant is whether the Act imposes an obligation on an employer to discuss this matter on request of his employees' representative when the employer relocates and continues to operate

the same business at a new site. The Act permits no doubt that such an obligation exists. Relocation of a business plainly affects, indeed threatens the continuance of, employees' tenure and conditions of employment, with respect to which the Act commands good faith negotiation. Sections 8 (a) (5), 8 (d) and 9 (a) of the Act. *N.L.R.B.* v. *Taylor Mfg. Co.,* 222 F. 2d 719 (C.A. 5), enforcing 109 NLRB 1045, 1048; *N.L.R.B.* v. *Gerity Whitaker Co.,* 137 F. 2d 198 (C.A. 6), certiorari denied, 318 U.S. 763, enforcing 33 NLRB 393; see *Inland Steel Co.* v. *N.L.R.B.,* 170 F. 2d 247, 252 (C.A. 7), certiorari denied, 336 U.S. 960. California Footwear's dereliction in this respect thus stands as a plain violation of Section 8 (a) (5) of the Act, as the Board unanimously found (R. 133, 147-148).

In view of the unlawful refusal to negotiate with the Union concerning the transfer of its employees to the Venice plant, respondents, we submit, were not entitled thereafter to terminate recognition of the Union on the ground that the Union could not show that a majority of the employees at Venice had designated it as their representative. For it is settled law that a loss of majority employee support does not invalidate a certification where such loss may reasonably be attributed to an employer's preceding refusal to bargain with the representative. This principle has been most frequently applied in cases where either defection from membership of existing employees or the failure of new employees to join a union, thus resulting in the union's loss of majority support, has

followed the commission of unfair labor practices by the employer. See, e.g. *Ray Brooks* v. *N.L.R.B.,* 348 U.S. 96, 102; *Franks Bros.* v. *N.L.RB.,* 321 U.S. 702, 705; *N.L.R.B.* v. *Idaho Egg Producers,* 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B.* v. *Geigy Co.,* 211 F. 2d 553, 558 (C.A. 9), certiorari denied, 348 U.S. 821; *N.L.R.B.* v. *Carlton Wood Products,* 201 F. 2d 863, 867 (C.A. 9); cf. *N.L.R.B.* v. *Warren Co.,* 350 U.S. 107, 110; *N.L.R.B.* v. *Shannon & Simpson Casket Co.,* 229 F. 2d 652 (C.A. 9). As stated by this Court, "the theory of these cases is that it is reasonable to assume that in the presence of unfair labor practices a decline in employee support does not reflect an untrammelled expression of the employees' will, and that the unfair labor practices must be purged before the representation question can be accurately determined." *N.L.R.B.* v. *Andrew Jergens Co.,* 175 F. 2d 130, 139 (C.A. 9), certiorari denied, 338 U.S. 827. Moreover, the validity of a bargaining order in such cases is not impaired by the fact "that some losses may be motivated by other factors" where it is "impossible to disentangle them so long as the refusal to bargain stands." *Ibid.* Cf. *N.L.R.B.* v. *Swinerton,* 202 F. 2d 511, 515-516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 907 (C.A. 9).

The same principle controls here.[21] Had the em-

[21] It is immaterial under this principle that the reasons which prompted California Footwear to relocate in Venice were unconnected with unionism. For as the cases cited in the text make clear, it is enough to support the requirement of continued recognition of a union that its inability to establish its majority follows an employer's unfair labor practices to which the loss of majority might reasonably be attributed.

ployees at the Los Angeles plant transferred to the new location, presumably there would have been no dilution in employee support for the Union. Although it cannot be known with certainty whether such a transfer of employees would have resulted from negotiations between California Footwear and the Union, the Board could reasonably conclude that but for California Footwear's unlawful refusal to negotiate, an agreement might have been reached by which substantially the same work force would have been maintained at Venice as existed at the Los Angeles plant. As the Board observed, the fifteen mile distance between the two plants, both of which lie within the Los Angeles metropolitan area, did not place the Venice plant "beyond the normal commuting practices in such metropolitan area" (R. 138). Indeed, it is likely that many of the employees lived closer to the Venice location than that distance. Also reflecting the likelihood that at least a substantial number of the Los Angeles employees would have welcomed job opportunities at the Venice plant is the letter written to respondents by the Union requesting such employment on behalf of "all of the employees engaged at the old job" (R. 349). It is noteworthy in this respect that the several Los Angeles employees who applied or were offered jobs at Venice were willing to commute to the new location. Also of significance is the fact that California Footwear implemented its plan to get rid of the Union by disavowing any control over the Venice plant and by refusing to discuss the transfer of employees to it; respondents might well have feared that negotiations on this matter might result in

staffing the new plant with the same Union members it had employed in Los Angeles.[22]

From the foregoing it seems clear that there was a reasonable possibility that except for California Footwear's unlawful refusal to bargain the Union would have retained its majority at the Venice plant by a transfer of old employees. And as the authorities cited, *supra,* p. 38, establish, no more than such a reasonable possibility is necessary to warrant the requirement, contained in the Board's order in this case, that the Union continue to be recognized as the representative of the employees.

It follows from what has just been shown—that respondents' refusal to recognize the Union after the relocation of the business in Venice was unlawful—that the further steps taken by respondents in terminating the existing contract with the Union and establishing new conditions of employment were also unlawful. Thus, respondents' unilateral imposition of working conditions, with neither notice to nor discussion with the Union, is directly contrary to the Act's injunction that such matters be negotiated be-

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[22] The considerations discussed in the text distinguish the instant case from the Board's decision in *Brown Truck & Trailer Mfg. Co.,* 106 NLRB 999, where a loss of majority support for the union upon removal of the plant to a new location and the hiring of new employees was held to excuse the employer from continuing to recognize the union as the representative of his employees, even though he had failed to discuss with the union the transfer of old employees to the new location. Thus, the greater distance between the new and old plants in the *Brown* case, along with the absence of any indication that the employees wished to be transferred, "raised serious doubts that a majority of employees would have transferred to the new plant even if the [employer] here had bargained in regard to transfers" (R. 138).

tween employer and employee representative. See e.g., *N.L.R.B.* v. *Crompton-Highland Mills,* 337 U.S. 217, 223; *May Department Stores* v. *N.L.R.B.,* 326 U.S. 376, 384; *N.L.R.B.* v. *Shannon & Simpson Casket Co.,* 208 F. 2d 545, 548 (C.A. 9).

Similarly, as the Board found, respondents' refusal to apply the existing contract with the Union at the Venice plant was in violation of the good faith bargaining requirements contained in Section 8 (d) of the Act. Thus, Section 8 (d) in applicable part provides that "where there is in effect a collective bargaining contract . . . no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification [complies with specified notice and negotiation requirements]." Respondents made no effort to comply with any of the requirements made prerequisite to contract termination by Section 8 (d), but simply refused to continue the existing contract when production began at the Venice plant, even though that contract by its terms had many months to run.[23] In view of the established facts that California Footwear, a party to the contract, remained as the real employer at the Venice plant, that the Union remained representative of the employees at the Venice plant, and that the nature of the work and circumstances under which it was performed remained the same after the move to Venice, there can be little doubt that the existing contract remained "in effect" throughout the events in

[23] Manufacturing at the Venice plant began on a small scale in December, 1952. The contract between California Footwear and the Union was not terminable until September 30, 1953 (R. 352).

this case, thereby subjecting respondents to the provisions in Section 8 (d) which they failed to observe. Nothing in the contract itself suggests otherwise. The parties there expressed their intent that its provisions should continue in effect until September 30, 1953, and in view of the continuity in relationship between the parties and in the business carried on, there is no reason to suppose that a change in location within the same metropolitan area would require an interruption of the stability which the contract purported to achieve. Cf. *McQuay-Norris Mfg. Co.,* 15 LRRM 1703 (W.L.B.) Moreover, as the Board pointed out (R. 139-140) the contract in this case would bar a rival union from obtaining a representation election during its term, notwithstanding the relocation of the business in Venice. Thus, under the Board's "contract-bar" policy, which operates to immunize industrial relationships from disruptive challenges by competing unions during the period in which conditions have been stabilized by a valid contract, California Footwear's move to Venice did not warrant a break in the continuity of its relationship with the Union which would be sufficient to throw open the question of employee representation until the expiration of the existing contract.[24]

In sum, respondents were no less duty bound to

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[24] The Board's contract-bar rules, in general, have been approved by this and other courts of appeals. *Iob* v. *Los Angeles Brewing Co.,* 183 F. 2d 398, 404 (C.A. 9); *N.L.R.B.* v. *Efco Mfg. Co.,* 203 F. 2d 458, 459 (C.A. 1); *N.L.R.B.* v. *Geraldine Novelty Co.,* 173 F. 2d 14, 17, 18 (C.A. 2); *N.L.R.B.* v. *Public Service Transport,* 177 F. 2d 119, 124 (C.A. 3); *Kearney & Trecker* v. *N.L.R.B.,* 210 F. 2d 852, 857 (C.A. 7), certiorari denied, 348 U.S. 824.

observe the terms of the existing contract at the Venice plant than to recognize the Union as the continuing representative of respondents' employees. These parallel requirements are plainly appropriate to accomplishing the proper objective of restoring the "conditions at the Respondents' plant . . . as nearly as possible to those which would have existed in the absence of the Respondents' unfair labor practices." (R. 140). See *I.A.M.* v. *N.L.R.B.*, 311 U.S. 72, 82.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's order be enforced in full.

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December, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

Definitions

* * * * *

Sec. 2. When used in this Act— * * *

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . .

* * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (in-

cluding the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order; and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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